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No. 704

In the Supreme Court of the United States

OCTOBER TERM, 1948

ANTHONY LINQUATA, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit (R. 115, 116) affirming the judgment of the District Court of the United States for the District of Massachusetts (R. 7, 8) to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said United States Court of Appeals for the First Circuit be reversed by this Court and for such further relief as to this Court may seem proper.

OPINIONS BELOW

The opinion of the Court of Appeals (R, 109-115) has not

yet been reported. Judgment was entered in the District Court without opinion.

Jurisdiction

The judgment of the Court of Appeals was entered March 9, 1949 (R. 115-116). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether in a prosecution for willful evasion of income tax by a taxpayer on a cash calendar year basis under 26 U.S.C. 145-b it is proper for the District Court to instruct the jury that actual receipt of the income can be inferred from the sole finding of ownership of the income producing property.

2. Whether it was proper in such a prosecution, under the doctrine of *Spies* v. *United States* 317 U.S. 492 to (a) allow in evidence withholding tax returns signed by the defendant but relating to the earnings of his co-venturers, over which earnings the defendant had no control or power to make payment, and (b) instruct the jury that evidence of willfulness by the defendant in evading his own tax can be found from the fact that the defendant inaccurately reported the aforesaid earnings of such other persons.

3. Whether the Government, under the principles of the Common Law, can disregard adverse, uncontradicted, and unimpeached testimony offered by its witnesses in contravention to Rule 26 of the Federal Rules of Criminal Procedure.

4. Whether under the doctrine of *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, it was proper to allow a verdict of guilty to stand which rested on an inference of guilt

where an inference of innocence of at least equal weight arose from the same set of circumstances.

5. Whether the Court of Appeals could disregard the manner in which the case was sent to the jury by the District Court for determination and decide the question of guilt or innocence upon its own interpretation of the record.

Statutes Involved

Title 26 U.S.C. 145-b provides:

> "*Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution."

Title 26 U.S.C. 1621-d-1 provides:

> "If the person for whom the individual performs or performed the services does not have the control of the payment of the wages for such service, the term 'employer' (except for the purposes of subsection (a)) means the person having control of the payment of such wages."

Rule Involved

Rule 26, of the Federal Rules of Criminal Procedure for the District Courts of the United States provides:

> "*Evidence.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Statement

Your petitioner, Anthony Linquata, hereinafter referred to as "defendant" was indicted (R. 1-4) March 18, 1947 on three counts, covering the years 1942, 1943, and 1944, charging willful attempts to evade the payment of his true income tax in violation of Title 26, United States Code, Section 145-b. Upon trial in the District Court for the District of Massachusetts, (R. 5) a verdict of guilty was returned on each count (R. 6) and a judgment was entered (R. 7-8) sentencing the defendant to imprisonment for a year and a day upon each count, sentences to run concurrently, and levying a fine of One Thousand Dollars on Count 3. On appeal, the Court of Appeals for the First Circuit affirmed the judgment of the District Court (R. 109-115), March 9, 1949.

The relevant facts may be summarized as follows:

The defendant is a commercial fisherman who during the

years in question was the captain of the fishing boat "Natalie III". The returns as filed by him are not challenged or disputed by the Government except as to the amount of gross income received by him (R. 11). It was agreed that as regards income tax returns the defendant was on a cash calendar year basis. (R. 46)

The fishing operations were carried on under a lay system, so called, whereby the crew received a proportionate part of the money obtained from the sale of the catch. There were, in fact, two kinds of lays,—depending upon the kind of fishing in which the boat was engaged at the time. When the boat went dragging for ground fish, it operated on the 60-40 lay; that is, after the payment of the trip expenses, sixty per cent of the remaining proceeds of the catch went to the crew and forty per cent to the owners of the boat. When the boat went seining, it operated on the so-called "Italian lay",—that is, after the payment of the trip expenses the balance was divided into shares, each member of the crew and the captain getting one share and the boat owners six shares. Usually when the boat operated on the "Italian lay" it carried a crew of fifteen men including the captain so that the total number of shares was twenty-one. (See Judge's charge R. 95)

The practice or method of dividing the proceeds of the catch as unchallengedly testified to by all the witnesses inquired thereof was as follows: When the fish was sold, the buyers issued weighing slips showing the amounts purchased and the price. Payment was made either in check or in cash; in no instance where the payment was in cash was there any testimony that the cash was paid to the defendant. The checks were usually made payable to the order of the "Natalie III" and in the majority of cases

did not purport to be endorsed by the defendant but were endorsed by some member of the crew. In all cases, including those where the checks bore defendant's endorsement, the checks were cashed by some member of the crew and the proceeds brought aboard ship.

When the cash was brought aboard the ship, the crew gathered in the forecastle and one of the members, usually the purser, counted out the money, checked it with the purchase slips, deducted from the money the trip expenses, and divided the balance according to the lay system. At no time was the defendant present in the forecastle while the division was being made, even though he might at times have been on the deck above. Defendant's share as a crew member was usually brought to him by one of the crew but there is no statement or evidence by anybody that the boat's share was delivered to the defendant; on the contrary, the uncontradicted and unimpeached testimony of the witnesses (some of them produced by the Government) who were inquired of on this point is that the boat's share was taken either to the office of the Progressive Fish Wharf, Inc. and delivered to Mrs. Lawson, the bookkeeper, or taken to the home of the defendant's father, Marco Linquata, who defendant said was a half owner of the boat. (Lawson R. 34; Billante R. 41; Sam Linquata R. 47; Demetrie R. 52; Joe Linquata R. 82; and Michael Linquata R. 84) In fact, the Court charged the jury that "there is no affirmative clear showing that Anthony Linquata (the defendant) was present at the division of the money. So you have no direct evidence that Anthony Linquata received cash except perhaps the cash that he received as captain and a member of the crew, but you can make such inference from the surrounding circumstances as a reasonable man would make". (R. 96)

There was considerable conflict of testimony as to the ownership of the "Natalie III", the defendant asserting that he was a one-fourth owner, and the Government contending that the defendant was the sole owner. Custom House registration of the "Natalie III" for the three years in question (Exhibit A) showed that the ownership was "Anthony Linquata, M.O., owning one-fourth, Marco Linquata, owning one-half, and Thomas Linquata, owning one-fourth, all of Gloucester, Massachusetts". However, when the defendant was interrogated several years afterwards by the revenue agents, he said he was the sole owner of the boat, and the finding of guilty by the jury necessarily implies that the jury found defendant was the sole owner and the case is now treated on that basis.

Subject to defendant's objection, (R. 102) the Court charged the jury: "Now if you should decide that he (defendant) *was the sole owner of the boat, you would have sufficient evidence, it seems to me, to conclude that he was not only the owner but that he actually received the money*". (Italics supplied) (R. 99) The court also charged the jury, subject to defendant's objection, that: "The law requires that every man who is subject to the income tax law should keep accurate records. If a person fails to keep records, or keeps inaccurate records deliberately, *or keeps related records in a deliberately false manner*, then you have a basis for saying that he was willfully seeking to evade or defeat the tax. You have a right to take into account his course of conduct contemporaneously with the earning of the money to see whether or not he is trying to keep the records correctly and in accordance with law in order that he could make a correct report and payment, and if he has deliberately kept false records *or knows that false records are being made which will be*

used in connection with the computation of his income tax, you may, if you see fit, *conclude that he willfully attempted to* evade or defeat a tax. (R. 100, 101) (Italics supplied)

At the close of the Government's case the defendant made a motion for judgment of acquittal on each of the three counts of the indictment which the District Court after hearing denied. (R. 78) At the close of all the evidence the defendant made a motion for judgment of acquittal on each of the three counts which motion the Court denied subject to the defendant's objection.

Specifications of Errors to be Urged

The Court of Appeals committed error:

1. In sustaining the ruling of the District Court that in an income tax case where the taxpayer was on the cash calendar year basis a jury could be instructed that receipt of income could be inferred from the sole finding of ownership of the income producing property.

2. In sustaining the District Court in its application of the doctrine of *Spies* v. *United States,* 317 U.S. 492, (a) by allowing in evidence withholding tax returns signed by the defendant relating to the earnings of his co-venturers, over which earnings the defendant had no control or power to make payment, and (b) by instructing the jury that evidence of willfulness by the defendant in evading his own tax can be found from the fact the defendant inaccurately reported the aforesaid earnings of such other persons.

3. In refusing to hold that the Government was bound by the adverse uncontradicted unimpeached tes-

timony offered by it in accordance with Rule 26 of the Rules of Criminal Procedure and the principles of the common law.

4. In allowing the verdicts of guilty to stand, where the evidence as to actual receipt of income was susceptible to equal and opposite inferences, in direct conflict with the rule laid down in *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333.

5. In refusing to decide the case on the basis in which it was presented by the trial court to the jury, and in deciding the case *de novo* on its own impression of the record.

Reasons for Granting the Writ

The basic position of the petitioner is that the jury did not have before it enough competent evidence upon which it could convict the defendant, except for the erroneous instruction given it by the District Court as to the consequence of sole ownership of the boat, and the erroneous instruction as to the making of the withholding tax returns of the income of defendant's co-venturers. Inherent in the decision of the Court of Appeals in affirming this conviction is a conflict with holdings of this court and with holdings of other Courts of Appeal. The instructions given the jury as to the effect of the evidence presented by the Government were improper. An application of the proper rules of law to the evidence results in the destruction of the purported basis for submitting the case to the jury and leaves no adequate basis upon which any jury could reasonably find the defendant guilty beyond a reasonable doubt.

1. *The instruction to the jury that the sole fact of owner-*

ship of the fishing boat warranted the finding that the defendant received the boat's share of the proceeds of the catch was erroneous. It is undisputed that there was no direct evidence in this case that the defendant actually received the boat owner's share of the proceeds of the various catches. (R. 96, 113) No records of the defendant or of any other person show payment to or receipt by the defendant of sums greater than were reported. In such a situation appellate courts have affirmed convictions only where it appeared that two distinct factors had been demonstrated beyond a reasonable doubt—first, the defendant was shown to be engaged in a very profitable trade or business, or in an illicit business, and, second, it was shown that the defendant has had in his possession funds which could not be satisfactorily explained, or that such funds passed through his hands.

Gleckman v. *United States*, 80 F.2d 394 (C.A. 8)
United States v. *Zimmerman*, 108 F.2 370 (C.A. 7)
Capone v. *United States*, 51 F.2d 609 (C.A. 7)
Orzechowski v. *United States*, 37 F.2d 713 (C.A. 3)

The basis of decision of the cases cited is that both the ownership of a profitable business and *flow of income to the defendant* must be proved. No court previously has held in a criminal case that the fruits of a business *inevitably* flow to its owner; but the effect of the trial court's instruction to the jury in this case on the question of the ownership of the boat is to dispense with necessity of proof of the flow of the income.

Both the District Court, and the Court of Appeals stated without qualification that there was no direct evidence that the defendant actually received the boat owner's share of

the proceeds of the various catches. (R. 96, 113) In the face of this fact, the District Court erred in charging the jury that the fact of ownership of the boat supplied the evidentiary basis required to surmount this lack of direct evidence and to find beyond a reasonable doubt that the defendant received the money. The defendant made seasonable objection to this portion of the charge. (R. 102) The theory presented by the charge utterly fails, and since, therefore, an essential element of the case was not proved, a judgment of acquittal for the defendant became mandatory. There are two essential elements that must appear in the Government's case, ownership of the boat, and receipt of income. The Court erred seriously in charging that a finding of ownership was of itself enough also to warrant a finding of receipt of income by the defendant, and it is properly assumed that the jury followed the court's instruction. There can be no mistake as to what the jury understood as is abundantly clear from a comparison of the charge on the two elements in question. As to the issue of ownership, the Court quite properly charged as follows:

> "In trying to decide the issue of ownership, you are by far the best judges. You have heard the testimony and you know whether you are persuaded beyond a reasonable doubt that Anthony Linquata was the sole owner. You will take into account all the matters in evidence, the registration, the assessments, his own statements under oath when questioned by the Internal Revenue officials after he knew he was under investigation." (R. 99)

However, the charge as to receipt lacked qualification and stands in its effect upon the jury as a statement of law. The Court charged:

> "Now if you should decide that he was the sole owner of the boat you would have sufficient evidence, it seems to me, to conclude that he was not only the owner but that he actually received the money. But you are not bound to do that. It is entirely up to you." (R. 99)

On the basis of the charge quoted, the jury was led to believe that ownership in and of itself was "sufficient evidence" to justify a finding of receipt. The labored and tortuous reasoning of the Court of Appeals can in no way change this fact; there is no reference to other evidence in the case in this portion of the charge. There is no discussion or identification by the District Court of any other evidence in the record which aids the fact of ownership in allowing the jury to reach the finding indicated. The Court had previously charged:

> "So you have no direct evidence that Anthony Linquata received cash except perhaps the cash he received as a captain and a member of the crew, but you may make such inferences from the *surrounding circumstances* as a reasonable man would make". (R. 96) (Italics supplied)

But what are the "surrounding circumstances", aside from ownership, which will support the desired inference? The petitioner submits that there are none. The only evidence which can possibly relate to "surrounding circumstances" in this connection concern the operation of the fishing venture and the division of the proceeds aboard the "Natalie III". This evidence does not show payments to the defendant of more than his share as captain and does not indicate a flow of the owners' share of the proceeds to him.

In fact, the contrary is established by the testimony of the Government's own witnesses who stated the owners' shares were delivered either to the bookkeeper at the Progressive Fish Wharf, Inc. or, and as regards the greater part of the money, to the defendant's father, Marco Linquata, who was the half owner of the boat. The petitioner submits that the Government is bound by this testimony because it was adverse, uncontradicted, and unimpeached. This being so, it is clear beyond question that no circumstance in the case beside the sole finding of ownership allows an inference of receipt, for there was no evidence of any kind showing, or tending to show, that Marco Linquata gave to Anthony Linquata more than one quarter of the money he received. Further, there was a total lack of evidence of any circumstances of unexplained sums of money or property in the hands of the defendant; nor was there any showing that the defendant's expenditures or mode of living was inconsistent with the income actually reported by him.

In considering this element of the case, the Court of Appeals laid stress upon an admission by the defendant to the revenue officers that he received the boat's income, which fact he denied at the trial. But the defendant made this statement in 1945 and it is therefore so far divorced in time from the happenings during the years 1942, 1943, and 1944 that it cannot be considered a "surrounding circumstance". That the Court of Appeals felt this admission was important does not alter the fact the case was sent to the jury to find guilt on facts that existed contemporaneously with the sale of the fish and the division of its proceeds. The verdict must stand or fall on review on that basis if the defendant is to have a fair and honest trial. It is not for the Court of Appeals to decide *de novo* how it would find on all the evidence; the Government is bound

in the Appellate Court by the District Court's instruction to the jury just as much as it was in the District Court. Only the defendant can complain of these instructions. And it goes against all principles of trial by jury to have an Appellate Court say what it would find were it the jury.

It is therefore apparent that the judgment of the Court of Appeals is in conflict with the rule of decision and reasoning of other Courts of Appeal in the following and other similar cases.

Gleckman v. *United States*, 80 F.2d 394 (C.A. 8)
United States v. *Zimmerman*, 108 F.2d 370 (C.A. 7)
Capone v. *United States*, 51 F.2d 609 (C.A. 7)
Orzechowski v. *United States*, 37 F.2d 713 (C.A. 3)

At the same time, in applying the fiction of income inevitably flowing to the owner of income producing property, the court applies a rule of decision of extreme importance in the judicial determination of tax evasion cases. This position involving the extension of the doctrine smacking of constructive receipt of income to a criminal case was urged upon the Court of Appeals in the Government's brief. It is clear that this court has never taken occasion to so extend the doctrine of constructive receipt and in no case that counsel has discovered has an appellate court assumed to do so. Any extension of this artificial concept into the field of criminal law where the defendant must be proven guilty beyond a reasonable doubt is fraught with danger and should not be undertaken, if at all, without the approval of this court.

2. *Under the doctrine of Spies v. United States, 317 U.S. 492, it was clearly erroneous for the District Court; (a) to*

allow in evidence withholding tax returns signed by the defendant relating to the earnings of his co-venturers, over which earnings the defendant had no control or power to make payment, and (b) to instruct the jury that evidence of willfulness by the defendant in evading his own tax can be found from the fact the defendant inaccurately reported the aforesaid earnings of such other persons. The portion of the charge to the jury which your petitioner submits cannot be reconciled with the decision and reasoning of *Spies* v. *United States*, 317 U.S. 492 as applied to the facts in this case is as follows:

> "If a person fails to keep records or keeps inaccurate records deliberately, or keeps related records in a deliberately false manner, then you have a basis for saying that he was willfully seeking to evade or defeat the tax". (R. 100)

The essential point is that the "related records" in this case in no way concern the income of the defendant or his tax liability. The court refers to social security records, the W-2's and the records relating to the W-2's, (Exhibits 28, 33, and 34) all of which were admitted over the objections of the defendant. The Social Security records only relate to the first three thousand dollars of income earned by each fisherman as required by statute, and these with the others were not kept by the defendant in any way in order to show what business he was conducting; they were records kept under the direction of the witness, Margaret Lawson, under the impression held by her that the defendant was obliged to keep such records for purposes not connected with the ascertainment of defendant's own income. (R. 30-31))

The error complained of is two-fold—First, in holding that under the actual circumstances as they existed in this case, the defendant, who never handled the cash receipts of the catch and who never distributed the shares to the crew, was obliged to withhold from his co-venturers their proper amount of income taxes, and was obliged to make proper returns of the amounts which should have been withheld, (Title 26, U.S.C. 1621-d-1); and Second, his failure to do so, and in reporting only what amounts he received by way of taxes from his co-venturers, which amounts incorrectly reflected the earnings of his co-venturers as he knew, was evidence from which the jury could infer that defendant willfully attempted to evade payment of his own income taxes. The income concerned in these returns was that of the fishermen, and not of the defendant. The fact that the defendant may have aided other individuals to conceal their true income is not material to the issue before the court. This court has considered the extent to which false records can be the basis of a finding of willfulness in prosecutions under Sec. 145-b Title 26 of the United States Code.

Spies v. *United States*, 217 U.S. 492

The court states:

> "By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling one's own affairs to avoid the making of records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal". (p. 499)

While the language quoted is broad in terms of method of concealment of income, it is restrictive as to whose income is concealed and whose records conceal it. This court speaks of "one's own affairs" and implicitly it considers records which could be damaging to be of the same character. The trial court below recognized the withholding forms were not the records of the defendant but charged, (R. 100) willfulness could be found if he "keeps related records in a deliberately false manner". The "related records" in this case do not concern the income of this defendant or in any way with the source of the defendant's income or its flow to him. The records deal with fruit from the same tree, but with fruit which has been picked by other persons, and against which the defendant has no claim. There is no evidence that defendant personally kept or authorized the W-2's to be kept as part of the record of the transactions of the fishing boat, "Natalie III". On this statement of the facts, the trial court misapplied the doctrine of *Spies* v. *United States (supra)* and erred in allowing the jury to base an inference of willfulness upon the understatements contained in the withholding returns of the fishermen and the records kept by Margaret Lawson.

3. *The Government was bound by the evidence presented by the Government which negatived any inference that Anthony Linquata received the boat's share of the proceeds of the various catches.* The inference of the receipt of the boat's share of the proceeds of the various catches by Anthony Linquata can in no way be inferred from the circumstance of ownership of the boat where binding direct evidence exists that the boat's share was never paid over to the defendant and in many instances was turned over to another person. The Government called as its witnesses, and presented the testimony of, Salvatore (Sam) Linquata,

Margaret Lawson, and Augustus Demetrie. These witnesses all testified that on many occasions the owners' share of the profits of the "Natalie III" were taken to Marco Linquata, who, the boat registry showed, was a one-half owner of the boat. This testimony is adverse to the Government which produced them as witnesses and according to the principles of the common law incorporated in Rule 26 of the Federal Rules of Criminal Procedure is binding upon the Government and clearly makes impossible any inference that Anthony Linquata received the money.

Cartello v. *United States*, 93 F.2d 412 (C.A. 8)
Hartz v. *Commissioner*, 170 F.2d 313 (C.A. 8)
Yellow Cab Co. v. *Rodgers*, 61 F.2d 729 (C.A. 3)
Murphy v. *Boston Elevated Railway*, 262 Mass. 485

The effect of testimony by a witness for a party stems from the earliest days of common law when witnesses were oath swearers. It was unthinkable that a party impeach or contradict the oath of one he called on his behalf. 3 *Wigmore* 383 Para. 896 ff. This common law principle is applicable to the case under the language of Rule 26 of the Federal Rules of Criminal Procedure.

This same rule as to the binding effect of testimony has been applied in the Federal Courts. In *Cartello* v. *United States*, 93 F.2d 412 (C.A. 8) during a prosecution for ballot fraud, the Government presented witnesses who testified the defendant had done nothing improper. In reversing a conviction, the court stated;

> "Ordinarily a litigant is bound by the testimony of his own witnesses, especially if that testimony is uncontradicted and there is no claim of mistake." (p. 415)

It is to be noted that there the Government, in a criminal case, was treated as any other party and the testimony of its witnesses held binding.

Yellow Cab Co. v. *Rodgers*, 61 F.2d 729 (C.A. 3)

See also, *Jacobson* v. *Hahn*, 88 F.2d 433 (C.A. 2)

The binding effect of uncontroverted testimony in a tax matter was clearly established recently in the eighth circuit.

Hartz v. *Commissioner*, 170 F.2d 313 (C.A. 8)

Apparently the Court of Appeals accepted a great part of the petitioner's position as to the binding effect of the testimony which placed a large share of the income from the boat in the hands of Marco Linquata. The court at least realized and treated the case on the basis that all the evidence material to disposition of income was to the effect that it was paid over to Marco.

The court said:

> "Apparently, however, neither the entire boat owners' share, nor any part of it was ever delivered to the defendant with his share as a crew member. All that appears is that the purser of the boat sometimes delivered the boat owners' share to the bookkeeper of a wholesale fish company, who as a side line kept some records and books for the defendant, who deposited it in a checking account carried in a local bank in the boat's name, and sometimes the purser delivered it directly to the defendant's father. The evidence as

> to the ultimate disposition of this share by the defendant's father and from the checking account is fragmentary . . . Thus there is no direct evidence of actual payments to the defendant of more than a quarter of the boat owners' share". (R. 113)

But, recognition of the true situation in no way cures the error of the District Court in allowing the jury to disregard the binding evidence that money did pass to the defendant's father and to find by an "inference from the surrounding circumstances" that the defendant "got it directly or through somebody acting for him". If the jury was bound by the binding evidence to find the money in question did not go directly to the defendant, then it was error to allow the jury to infer to the contrary. And where there was no other proper basis on which receipt could be supported beyond a reasonable doubt, the court should have granted the defendant's motion for a judgment of acquittal.

If, as now demonstrated, the defendant did not receive the money directly, were there such "surrounding circumstances" as would permit an inference that the defendant received the money through an agent? (See charge, R. 95) Surely the receipt of the proceeds of the sale of the fish by the purser for the crew and the division which took place on the "Natalie III" affords no basis for such an inference, for the purser was not the defendant's agent to receive the boat's share. Until the division took place and the boat's share ascertained, the purser was acting for himself and his co-venturers, and when the boat's share was ascertained the evidence showed that it went into the hands of the defendant's father; and the Government has never contended the defendant's father was the agent of the defendant. Therefore, there is no proper basis in the evidence for the

support of either theory of receipt by the defendant presented by the charge of the District Court. In such a situation, the motion of the defendant for a judgment of acquittal was improperly denied.

4. *It was improper to allow the verdicts of guilty to stand, where the evidence as to actual receipt of income was susceptible to equal and opposite inferences, in direct conflict with the rule laid down in Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333.* There is admittedly a complete absence of direct testimony that the defendant received income beyond that reported (R, 96). The only way the Government can justify the jury's verdict is to say that there were circumstances in the case which warranted the jury in drawing the inference that the defendant received the money alleged and this inference could be found beyond a reasonable doubt. Yet it is clear that if Marco Linquata received part of the money the inference is clear that Anthony did not. That fact alone destroys any possibility of the jury being able to draw a contrary inference. In disregarding this logical result, the Court of Appeals is in direct conflict with a decision of this court.

Pennsylvania R. Co v. *Chamberlain*, 288 U.S. 333

This court stated the rule which petitioner believes is directly controlling of the case at bar. The court held:

> "And the desired inference is precluded for the further reason that the respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissable in the face of the positive and otherwise

> uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist." (pp 340-341)

The cited rule was applied in a civil case; it should be even more compelling here where this defendant must be proven guilty beyond a reasonable doubt. And it is to be noted further that effect was given to direct evidence by witnesses called by the defendant since they were uncontradicted and unimpeached. In the case at bar there was also uncontradicted and unimpeached evidence of witnesses called by the plaintiff, viz; the Government.

Even if the question of the effect of direct evidence is laid aside, the Government has presented a case where from the circumstances there is equal support for two inconsistent inferences. Where this circumstance exists, a conviction violates law enunciated by this court.

Pennsylvania R. Co. v. *Chamberlain,* 288 U.S. 333

If, by any stretch of the imagination, it could be inferred from the fact of ownership of the boat the defendant received the money (a proposition which we do not concede) there is, on the other hand testimony, stronger, certainly equally strong, from which the inference is permissable, if not compelled, that defendant did not receive the money. The evidence of the Government in no way precludes this latter inference. The court in the Pennsylvania Railroad case *(supra)* again states the rule most clearly:

> "We, therefore, have a case belonging to the class of cases where proven facts give equal support to each of two inconsistent inferences, in which event, neither of them being established, judgment as a matter of law, must go against the party upon whom rests the neces-

sity of sustaining one of these inferences as against the other before he is entitled to recover." (p 339)

The United States Court of Appeals for the Fifth Circuit found error in a charge very similar in theory to that in the instant case. *Williams* v. *United States* 55 F.2d 226 (C.A. 8). The defendant was convicted of using the mails to defraud. There was evidence that the defendant signed a fraudulent statement and that this statement was sent through the mails. The trial court charged that if the jury found that the defendant signed the statement they could find that he mailed it. The Court of Appeals reversed saying that mailing of the statement did not logically follow from the signing of it. It was possible and reasonable that the defendant contemplated some other method of delivery and that it was mailed without his consent. In the same way, ownership of the boat does not justify a finding of receipt of the boat's income beyond a reasonable doubt and this is doubly true where there is evidence to negate the receipt of the income to the defendant.

Cartello v. *United States*, 93 F.2d 412 (C.A. 8)

5. *The Court of Appeals refused to decide the case on the basis in which it was presented by the trial court to the jury, and decided the case de novo on its own impression of the record.* The Court of Appeals recognized that there was in the evidence no basis for an inference that the defendant was paid the owners' share directly at the time of the division or by a member of the crew, and that the evidence of the ultimate disposition of the money paid over to the defendant's father and the bookkeeper of the wholesale fish company was "fragmentary" (R. 113). Instead

of considering the case as it was presented to the jury by the District Court, the Court of Appeals searched through the record to seek to find some independent ground upon which a jury might have found the defendant guilty, and usurped the functions of the jury. The Court of Appeals took the position that on the basis of alleged admissions made by the defendant to the revenue agents a verdict of guilty was justifiable. In so doing, the Court ignored the case which was actually sent to the jury under the charge and assumed that the jury would disregard the charge given and decide the case without any instruction as to the law controlling the effect of these admissions. It is not for the Court of Appeals to substitute its own judgment for that of the jury without regard for the instructions actually given, and to decide *de novo* how it would find on all the evidence. The Government was bound on appeal to the Court of Appeals by the District Court's instructions just as much as it was in the District Court. Trial by jury, that great and traditional protector of the individual in our jurisprudence, will be destroyed if an appellate court may be allowed to decide cases on the basis of what it would find were it the jury.

Since these admissions were not considered by the District Court in its charge to the jury, it is not reasonable to say that it was the basis of the verdict returned where two other theories to establish receipt by the defendant were fully discussed and presented. The fact that these theories were not accepted by the Court of Appeals and cannot be supported by this court, as a matter of law, in no way demonstrates that the jury would disregard them in favor of a theory based on the admissions which were not considered in the charge. The opposite conclusion is inevitable.

Even if the matter of the admissions had been adverted

to by the District Court in its charge, under proper instructions, as we contend, as to the binding effect of the testimony as to where the money went, the jury would then be in a position to weigh the effect of these admissions, but in the absence of such a presentation by the District Court to the jury, it is error for the Court of Appeals to say in effect,—first, the jury must have reached its decision on the basis of the admissions, and second, if we were the jury, we would have reached that decision.

Conclusion

For the reasons stated, the Court of Appeals erred:

1. In holding that the District Court committed no error in its charge to the jury that ownership of the boat alone warranted the finding of receipt of income by the defendant.

2. In holding there was a proper basis on the whole record for finding that the defendant received income in excess of the sum reported.

3. In holding that the District Court committed no error in admitting withholding tax records in evidence and in its instructions as to the basis upon which willfulness could be found by the jury.

The decision of the Court of Appeals is in conflict with decisions of this court and of the several Courts of Appeal. The decision thus works a miscarriage of justice in the individual case and sets a precedent of wide applicability in the prosecution of tax evasion cases. It furthermore sets

up the appellate federal courts as forums to enforce the hindsight judgment of the judges as to the verdict they would have returned on all the evidence without regard to the instructions of the trial court. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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